

# SPEECH OF MR. BARNARD, OF NEW YORK,

ON THE

Report and Resolutions of the Committee on Elections, relative to the elections by General Ticket in the four recusant States of New Hampshire, Georgia, Mississippi, and Missouri.

DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE U. S., FEB. 13, 1844.

[The Report of the Committee on Elections, having the subject in charge by order of the House of Representatives, presents a labored argument, the conclusion of which was summed up in the following resolution:

"Resolved, That the second section of 'An act for the apportionment of Representatives among the several States according to the Sixth Census,' approved June 25, 1842, is not a *law* in pursuance of the Constitution of the United States, and valid, operative, and binding upon the States."

The debate was begun on Tuesday, the ninth day of February, and was continued daily, to the exclusion of all other business, for one week, having been closed by Mr. DOUGLASS, the author of the report, on Wednesday morning, the 14th of February. Mr. BARNARD spoke at a late hour on the preceding evening, and was the last who addressed the House in opposition to the report and resolution. About thirty gentlemen had been heard on the subject—all under the stringent and dwarfing effect of the one hour rule. Before the previous question was moved the form of the question was changed, so as to make the majority sustaining the report declare that the several persons (naming them) occupying seats from New Hampshire, Georgia, Mississippi, and Missouri, *had been duly elected, and were entitled to their seats*; thus endeavoring to avoid a direct declaration against the constitutionality and validity of the law of Congress, though this consequence was plainly involved in such a conclusion.]

Mr. BARNARD spoke to the following effect:

MR. SPEAKER: I must be allowed to begin what I have to say on the business now before us with expressing, not merely my dissent from, but my utter abhorrence of, a spurious and dangerous doctrine which has been allowed to circulate through the whole of this debate, without being once disputed or questioned; I mean the idea that it is within the constitutional competency of the House of Representatives to pronounce a law of Congress unconstitutional and void. This is so utterly repugnant to every notion which I entertain of a government of laws—of regular government of any kind—that my mind instinctively revolts at such a proposition; and I am satisfied that nothing can account for the easy manner in which so shocking a doctrine has obtained free currency in this House, but the fact that the minds of men amongst us have become familiarized, of late, with all sorts of bold and monstrous speculations in matters of society, politics, and government. Nothing is too bold for restless spirits to attempt; nothing is too absurd for ingenious minds to advocate and defend. These things meet us at every turn; and our sensibility to the general order, beauty, and perpetuity of things—always a more prompt, often a more unerring guide than the cold reason—is dulled and blunted amid the multiplicity and confusion of high-handed errors with which the general ear and the general mind are continually assailed and abused. How else it should happen, I do not know, that this idea of a competency in the House of Representatives, to annul a law of Congress, should have been received with

acquiescence and favor through a whole week's debate, instead of having been met at once with indignant denial and rebuke.

There is a proportion and fitness in the very frame of a great system which cannot be disturbed without hazard of bringing down the whole fabric in ruins. The delicate adjustment of the several parts, and the incorporation of the whole into one complete plan, with strict unity of design and purpose; all this deserves to be well considered when we are about to lay violent hands on any portion of its organic structure. If ours is a government of laws, then the laws ought to govern; and to my mind it is a startling and a fearful thing, when it is pretended to be discovered that there are cases in which one branch of the Government—not the judicial branch—or rather one fragment of a branch of the Government, acting, in this respect, merely in a ministerial capacity, has authority to sit in judgment on the validity of laws; to pronounce sentence of condemnation on them; to absolve itself from their obligation; and, along with itself, to absolve also as many of the people as may choose to avail themselves of this plenary indulgence.

It is a statute of this land that is proposed to be dispensed with, set aside, and annulled in this unceremonious way; an enactment made by the legislative authority of the country, appointed by the Constitution for this purpose, passed with all the accustomed forms of proceeding, and with the concurrence of the several branches and powers required to create and solemnize a statute. And it is one of the branches only—a fragmentary part—of the legislative power, which, standing alone, sets up this right of annulling a statute thus created and solemnized. It is a gross libel on the Constitution of the United States, and the memory of the illustrious men who framed it, to suppose that it authorizes such a proceeding.

The legislature of the country always has it in its power to retrace its steps, and to correct any mistakes into which it may have fallen, by a repeal of its own enactments. But an act repealing a statute is itself a statute, and must be enacted by the full concurrence of the whole legislative authority. Nothing short of this can effect a repeal; no action, from a legislative source less than this, can shake the force and obligation of a statute. How can it be pretended, then, that one branch of the legislature which cannot repeal, may, nevertheless, assume a higher prerogative, and annul a statute?

But what is the ground of the pretension set up in this case? It is said that the constitutional authority of Congress to pass the second section of the apportionment law is disputed; that if Congress had no such power the law is merely void; and that the question whether it be a law or not, or, which is the same thing, whether Congress had authority to pass it or not, is directly involved in the inquiry in which the House is now legitimately engaged—namely, an inquiry into “the elections, returns, and qualifications of its own members.” Of all this matter, it is said, the House is to be “the judge,” by direct constitutional appointment.

Nothing marks the character of an ingenuous, fair, and safe mind so strongly as the fact that it is always seen to pause, and resolutely turn back, when it is brought, in the course of an argument, to the verge of a great moral difficulty or evil. This affords a demonstration

which nothing can oppose, that the reasoning in the case has been wrong—that a false step has been taken somewhere in the process; and this is not a whit the less certain, because it may not be easy or possible to detect exactly where the false step was made. Ardent, bold, and reckless minds are in no way affected by such considerations as these: a plausible argument is as good for their purposes as a sound one. If it will succeed, it is no matter how much it deceives, and no matter how much mischief it accomplishes. The reasoning by which it is concluded that the House of Representatives has authority to annul a law of Congress, involves a moral absurdity and mischief which ought to make every honest mind renounce, at once and forever, both the conclusion and the argument.

When it was found that the Constitution made this House “the *judge* of the elections, returns, and qualifications of its own members,” it was natural enough, perhaps, to infer that judicial power was in some sense conferred on this body; and from this assumption it was an easy step to the conclusion, that this judicial power involved the right to decide on the constitutional validity of a law of Congress touching the election of members. When, however, the argument had reached this conclusion, and was found to involve the monstrous proposition, that one branch of the legislative body, sitting in that capacity, had a right to review, reverse, and annul the decision and acts of the whole legislative body—and that, too, in a matter not merely affecting its own organization, proceedings, or government, but affecting matters of public policy, in which the rights and interests of the whole people of the United States were vitally concerned—when this was discovered, it is difficult to understand how any fair mind could continue to rest for one moment longer on such a position. I know that it has been assented to here by many, because they have not given the subject the consideration it deserves.

The truth is, that the first error in this case is in ascribing to this House judicial power. Properly, it has no such power; its authority is all the while legislative, and with this—just like every court, as well as every legislative body—it has such incidental powers as are necessary to enable it to perform its proper and legitimate functions. One of these powers relates to its own organization, as another does to its own government. But these powers are more ministerial than judicial. The House may judge of the elections of its own members; but inspectors of elections are judges of elections also, and so are functionaries and boards of officers appointed to canvass the votes and returns, and declare the results; and nobody contends that these have any judicial power. The only difference is, that the House is to judge in the last instance, and that no appeal can be taken from its decision, except to the public voice or the popular will. Its decision is final, for the time being; and I grant that it may also be arbitrary—outraging all law and order, and defying all decency—and yet be without remedy, except in the virtue of an insulted people. Still the power is ministerial: in its nature and essence, it is just such a power as very inferior functionaries are often called on to perform—constables, bailiffs, and the like, as well as executive officers of high grade and dignity. They must all occasionally judge and decide on very important incidental

matters, in the course of the execution of their proper duties. Sometimes they have to administer oaths, and examine witnesses, and hear allegations, and so determine questions; but in all this they are never regarded as exercising judicial power—it is merely ministerial. Their business is to execute the law—to carry the law into effect, just as it stands, or just as it has been interpreted and declared by the judicial power.

And this is exactly the nature of the authority which this House has in the power “to judge of elections.” It is to take the law as it finds it, and determine who have been elected according to that law. If there be doubt about the meaning or construction of a law, it is undoubtedly to construe it for itself, in the absence of all judicial interpretation; but to construe it only for the purpose of executing it—not certainly for the purpose of annulling it. And if it be a statute of Congress which is to be considered and carried into effect, it is no matter what may happen to be the opinion of a political majority in this House—how united or unanimous—about its want of constitutional sanction; still the House cannot refuse to execute it, without incurring the certain guilt of throwing a well-ordered and regular system of government out of gear, and exposing it to confusion, anarchy, and destruction. It is no apology to say, that if the law is unconstitutional it is void, and ought not to be executed. If the House may say this, every functionary of the Government, high or low, having ministerial duties to perform, and every restless and rebellious spirit in the land, high or low, may say the same thing, and act accordingly. And all this would only be a practical illustration of the most disorganizing, mischievous, and monstrous political heresy ever uttered in this country—the effect of which is more and more manifest and melancholy every day—that both Constitution and laws are to be obeyed and executed by a public functionary *as he understands them*; and, of course, if by one public functionary, then by all; and if by public functionaries, then by every citizen. For such persons to say that a law is unconstitutional, and to act accordingly, is to set up private judgment against public authority. Congress judges, in the first instance, of the question of constitutionality in regard to every act which it passes, and determines that question in favor of the law. So far, there is a legislative interpretation of the Constitution. This is authoritative, and is to stand as the judgment of the whole country on the subject, until that interpretation is reversed in the courts—the only place known to the Constitution where the question can be legitimately entertained, or the reversal authoritatively made. If functionaries, who are to carry a statute into effect, ministerially, may stop to question its validity, may try that question, and pronounce the statute inoperative and void, should their judgment or caprice lead them to that conclusion—then statutes have no sanctions and no authority; and whatever else the Government may be, it is not a government of laws.

And this House, in regard to statutes touching the elections of its members, and acting under the power “to judge of the elections,” stands exactly in the predicament of any other functionary, bound by direct official obligation to carry into effect, ministerially, a law of the land—except, only, that in *its* violation or contempt of the law it may

escape judicial responsibility. Congress passes a law regulating the manner of holding elections for Representatives in the several States: this law is to be carried into effect first in the States, and finally in this House in case disputes arise. And this is all the House has or can have to do in the matter. No Congress could be formed—no House of Representatives could be constituted under the fundamental law—with-out statutory regulations, enacted either by the States or by Congress. Provision is made in the Constitution to this effect: When Congress, as the paramount power, passes a statute on the subject, that is the law of the land, and just as much of binding efficacy on this House as on the people, or the country at large. This House, alone, cannot make or unmake a law regulating the manner of holding elections. It may determine when elections are properly made under the law—just as other judges of elections may do—and there an end. Its business is to carry the law into effect, as the ministerial agency appointed for this purpose, and not to sit in judgment on its constitutional validity: That question was determined, so far as this House is concerned, when the law was passed; it was determined by the entire legislative power of the country; and it is preposterous to suppose that the Constitution should have intended to refer that same question back, under any circumstances, not to the whole Legislature, but to a component branch of it. For this House to act on such a supposition as it proposes now to do—to attempt to enlarge a mere ministerial agency, provided to make sure the execution of the law, into a high prerogative power, higher in some sense than that of repeal or of dispensation—the power to pronounce judgment of condemnation on a public statute—to pronounce a statute void for want of constitutional sanction; and thus, in effect, to make, or attempt to make, its decision a perpetual decree against any such legislation for ever—all this is, to my mind, disorganizing and revolutionary. It is in the strongest spirit of insubordination and lawlessness.

If this House *has* the power to decide on the constitutionality of laws of Congress—those relating to elections, or any other—it must at least be confessed that it is of all others the strangest and most unnatural, and unfit, of all tribunals which could have been devised for a duty so delicate, so difficult, and so responsible. The highest power known to our system, or to any system, is the power to pronounce judicial con-demnation on a law of Congress as void for want of constitutional sanc-tion. It is this amongst other things—and this is not the least—which makes the Supreme Court of the United States a tribunal of higher judi-cial authority and dignity than any similar tribunal in the world. The power to interpret constitutions; to settle their construction in disputed cases; to declare, to limit, to confirm their powers—all this is authority of supreme eminence and dignity. It may be entrusted to an inde-pendent and permanent Judiciary—but not to a political changeling, like the House of Representatives.

When a question of constitutional law, involving the construction of a power in that instrument, is once entertained, and deliberately and finally settled by the tribunal having the necessary authoirity, the result and decision becomes in effect incorporated into the Constitu-tion, and forms a part of it; it is itself constitutional law, as much as any part of the text of the Constitution. It becomes a part of the

fundamental law, and is to be regarded and obeyed as such ; and, like the text of the Constitution, it is permanent and perpetual, unless changed by a formal amendment of that instrument. The eleventh article of the Amendments of our Constitution was occasioned, as is well known, by a judicial construction which had been put on that part of the instrument which relates to the judicial power. Now, let any gentleman reflect on the manner in which the House of Representatives is composed—elected by the people every two years ; a political body, and changing its political majority almost as often as a new House is constituted—and then say, if he sees in this House a fit or safe tribunal for the judicial determination of questions of the nature of those referred to. Why, let its fitness be illustrated and tested by the very case we have in hand. Congress has passed a law for regulating the manner of holding elections for Representatives. This House now proposes to determine judicially, and will no doubt shortly so determine and declare in effect, that that law is void for want of constitutional authority. For the case and the occasion the Constitution will stand as this House shall pronounce and declare it. If the authority really resides in this House, which is contended for, then, the decision once made, it ought to be the same thing, as long as it lasts, as if a formal amendment had been made to this effect, namely, that nothing in the Constitution shall be held to authorize Congress to pass a law declaring or requiring that Representatives shall be elected in the several States by single districts. And this should be not merely the temporary, but the permanent effect, if the House really possesses this high judicial power. Its decision ought to be final. It should be revered and observed as a part of the Constitution—unchangeable, except by a formal amendment. But those who ascribe this power to this House do not pretend to look for any result, in this decision, beyond the temporary settlement of a disputed question of title to seats in the House for this present Congress. They know very well, if the political power of this body shall be in the hands of their opponents in the next Congress—as the chances are a thousand to one it will—that this decision of theirs will be promptly reversed, in case any individual should have the temerity then to offer himself as a Representative elected in defiance of the existing law of Congress. This they anticipate and expect ; and I venture to say it would never occur to one of them, in such a case, to attempt to defend on the ground of *res judicata*.

What sort of a mode, then, is this, of establishing, by judicial construction, what a constitution is—which is next to and hardly less than making or amending a constitution. The Constitution is to be one thing for the 28th Congress, and another thing for the 29th Congress ; and a law is to be unconstitutional for the 28th Congress, and perfectly constitutional for the 29th Congress. How can any man maintain and uphold a doctrine which involves consequences and absurdities such as these ? This high power on the part of this House, by which it is enabled to go behind the law and declare what the Constitution is, and what it shall be, at least for this present time, touching the subject to which the law relates, is found in the authority which declares that this House shall be “ the judge of the elections, &c., of its own members.” But does not every body see that the next House of Representatives is

to possess precisely the same authority, unaffected by any thing which this House can say or do, to judge of the elections of *its* members? "Each House is to be the judge, &c." The next House, then, must have the same right to declare the law of Congress constitutional, valid, and operative, as this House can have to declare it unconstitutional and void. And the only sound and rational conclusion is, that neither has a right to touch the question of constitutionality. The whole duty of the House is to carry the law into execution just as it stands, as the ministerial organ appointed by the Constitution for this very purpose. Congress has settled the constitutional question for this House and for the country, in the act of passing the law, and nothing is left for the House or the country to do but obey the law, except to resort to nullification. If the law is unconstitutional, Congress will repeal it the very hour that fact can be shown; but it requires something better than mere political or party opinions, having nothing in truth or reason to stand upon, to show that the law is unconstitutional.

The absurdity of this assumed authority, on the part of this House, is set in a strong light, when it is considered that the House, in this case, undertakes to declare the constitutional law of the land, not for its own government merely, but for the government of the whole American people. It is difficult to imagine what subject could be of more vital interest to the people of the United States, than one in which the principle of representation, the very soul and essence of our system, is involved. Elections are necessary to representation; and equal and just representation can only be secured to all the people by an equitable and just mode of holding and conducting the elections. Great and acknowledged inequality of representation was found to exist as between the different States. Some elected by general ticket, others elected by districts. This secured to the former States a very signal and unjust advantage over the latter on the floor of the House of Representatives. A State electing forty members by districts would be found to have its political strength so equally divided, that its power in the House, on the most important questions, would be outweighed by a State electing no more than two or three members by general ticket. The danger was that the large States would resort to the general ticket in self defence against the small States which had adopted that system; and then the remedy would be found worse than the disease. The power of the large States would overwhelm the small, when all elected by general ticket. The only true remedy was in a resort to the district system for all the States. Congress believed it had the power to prescribe that system, under the plain and unequivocal language of the Constitution. The law-making power made the law, and it was a law operating upon and affecting directly the great body of the people of the United States in a matter of vital interest to themselves. Under its authority all elections of representatives were to be held; it prescribed the mode, and the only mode, in which the great principle of popular representation in this Government was to be realized and accomplished. And such a law it was, and is, which this House undertakes to annul and set aside for want of constitutional sanction. This House will declare this law to be void, either directly by resolution to that effect, or practically by declaring that persons chosen by another mode are legally elected. This

House declares what the Constitution is, and what it shall be, in the case; and then declares what the existing and operative law is, and that the existing and operative law in the case is one which prescribes a mode of election the opposite of that which the act of Congress had prescribed. Here, then, the House sets itself above the law-making power, of which it is only a co-ordinate branch, and, in defiance of what the law-making power has prescribed under the Constitution, undertakes to declare both what the Constitution is, and what the actual and operative law is, overriding and trampling down a law of Congress, and that in a matter most deeply affecting the rights, duties, and privileges of the whole people of the United States. This House which, of itself, can make no law to bind the people of the United States on the most unimportant and trifling subject, may, according to this doctrine, *declare* the law, if it cannot make it, on subjects of the utmost moment, not only without the aid of the rest of the law-making power, but in spite of the whole of it. Congress has enacted and declared that representatives shall be elected from the several States by districts; this House overrules Congress, and declares and prescribes that the people of any State, who so choose, shall elect their representatives by general ticket; and this last is the law and the Constitution in the case. Monstrous, monstrous conclusion!

I deny, then, utterly, that this House is competent to entertain the question of the constitutional authority of Congress to pass the Election law which it is now called on to enforce and carry into effect; and that the attempt to set aside or annul that law is disorderly, disorganizing, and revolutionary. But, since the House is resolved to accomplish its unhallowed purpose in this respect, I turn to consider, for a few moments, the feeble and hollow pretence—for so I feel constrained to regard it, without permitting myself to doubt the sincerity of those who set it up—on which this high-handed measure is attempted to be justified. The whole argument for unconstitutionality or invalidity will be found to rest on a single averment, which, if admitted to be true, proves nothing, except that it is as easy for some minds to draw a false conclusion as a legitimate one.

But I must first be allowed to state the general ground on which the validity of the Election law rests. The whole ultimate authority over the manner of holding and conducting the elections for representatives rests with Congress. “The times, places, and manner of holding elections for representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations.” Such is the constitutional provision. By some mode of legislation or other, Congress may control and direct whatever relates to “the times, places, and manner of holding elections.” It is generally admitted, also, though some have denied it, who deny every thing, that Congress may prescribe the mode of electing by districts. This, at any rate, is what Congress has undertaken to do in the Election law.

That law is in general terms, and runs to this effect: “In each case where a State is entitled to more than one representative, the number to which each State shall be entitled shall be elected by districts composed of contiguous territory, equal in number to the number of repre-

sentatives to which said State shall be entitled—no one district electing more than one representative.” The act lays down a rule which fixes the mode of holding elections, and it purposely leaves to the State legislatures the duty of supplying by legislative enactment, if not already done, the particular provisions which may be necessary for holding the elections by this mode.

In all the States of the Union, except four, the necessary supplemental legislation is found. General ticket systems and double districts are given up. Every member on this floor, except from four States, has been elected from a single “district composed of contiguous territory.” The act of Congress, and the laws of the several States supplemental thereto or consistent therewith, form, together, the body of legislation under which this House is constituted, so far as twenty-two States are concerned.

In some respects this may be regarded as an anomaly in Government—the employment of two, or, it may be, of twenty-seven distinct legislatures to frame a body of laws on a single subject. A moment’s consideration will show us that the system is not only a reasonable and practical one, but that it is equally beautiful and harmonious. Our system of Government may be complicated to those who will not give themselves the trouble to understand it; it is perfectly simple to those who do.

The people of the United States are all the subjects of two Governments—in some things distinct and independent, in some things united and even blended, and in all things designed to act in perfect harmony.

Sometimes the people are regarded, in our system, solely as citizens of the several States, and, as such, they are governed solely by State laws. Municipal regulations, with enactments affecting property, persons, and crimes, and the like, belong generally to the State governments.

Sometimes the people are regarded, in our system, solely as citizens of the United States, as subjects of this National Government, and, as such,—at least in reference to many things—they are governed solely by the laws of the National Government. In relation to war, in relation to commerce, in relation to coins and their value, and the like, they are subject exclusively to the legislation of Congress.

But there are matters in relation to which, though the people are regarded in this system solely, or chiefly, as citizens of the United States, and subjects of the National Government, as its constituency, and properly subject, therefore, to the direct legislation, and certainly to the ultimate authority of the National Government, yet, as inhabitants of States, as a people or nation grouped in distinct municipal communities, the Constitution borrows or allows the aid of State or local legislation, as better adapted to details of measures and to local administration. There are numerous cases in the Constitution in which this concurrent and mutual legislation has been or might be employed; some of which has been referred to in the course of this debate, though not precisely in the view for which I refer to them.

Under the Constitution, this kind of concurrent and mutual legislation might be employed in laying imposts or duties for the use of the Treasury of the United States. The States may lay duties or imposts

with the consent of Congress. Congress might, therefore, authorize the States to enact laws on this subject, to fill up all the particulars and details of legislation, Congress itself prescribing the general rules and regulations under which the system of imposts or duties should be established and conducted. This plan of concurrent and mutual legislation *might* be resorted to, for the supply of the Treasury of the United States, from duties on imports, and the exclusive legislation of Congress on the subject given up, though it is not an experiment very likely to be tried.

In like manner, a navy and army, for public national defence, might be established by concurrent and mutual legislation between Congress and the several States. The States may "keep troops or ships of war in time of peace," with the consent of Congress. If this plan were resorted to, Congress would prescribe the general regulations and conditions, and the States would fill up with the necessary particulars. I only allude to what *might* be done under the Constitution, not what is likely to occur.

But there are cases in which this plan of concurrent and mutual legislation has actually been employed, and with complete harmony and success. By the Constitution, it belongs exclusively to Congress to provide for *organizing* the militia, except only that the appointment of the officers is reserved to the States. But Congress has contented itself with prescribing the *manner* in which the militia shall be organized, leaving to the States respectively to fill up the plan, and perfect the details. And the States *have* supplied the necessary details; and the militia system of the country now stands upon the mutual legislation of this Government and of the several States.

In all these cases, it will be observed, the object is altogether national; national purposes are all the while in view. It is the treasury of the nation that is to be supplied by duties and imposts. The nation alone can go to war. Insurrections and invasions are to be met by the National Government. Troops and ships of war, and militia, are wanted for these occasions. And it will also be observed that, in all these cases, the authority or right of the States to act at all in the premises is merely permissive. Congress might perfect its own system, leaving nothing for the States to do. It is for their interest to have their share in the legislation—as in regard to the militia; and their part is gladly performed, always in subjection to the paramount authority of Congress. And it is wholly a voluntary service, for no positive duty in the case is enjoined by the Constitution.

There is, however, another case, where this concurrent and mutual legislation has been employed, which is more strikingly analogous to the case under consideration. I refer to the manner in which the time of choosing electors of President is prescribed and regulated. Each State, by the Constitution, is to appoint electors in such manner as its legislature shall direct; but it is provided that "Congress may determine the time of choosing." In 1792, Congress enacted that each State should choose electors within thirty-four days previous to the first Wednesday in December; and each State, by its own legislation, fixes the day within the period prescribed by Congress.

Now it is evident to the commonest understanding that we have

another of these familiar examples, where concurrent and mutual legislation may be very profitably and wisely employed, in the case under debate. The election to be provided for is an election of representatives to the National Government. The voters are the constituency of this Government, though they are to elect, *in their respective States*, as inhabitants of States. The authority to prescribe regulations for holding the elections is delegated to the States. This was indispensable in the first instance, else no elections could have been held for the first Congress, inasmuch as the Constitution did not itself prescribe the necessary regulations. But this delegated authority was to be exercised only until Congress should interpose, except that so much of the necessary legislation in the case as Congress should at any time leave untouched by its own enactments would all the while and forever remain to the States. All this seems perfectly plain, not only from the language of the Constitution, but from the nature of the power, the object to be attained, and the mutual interest of the respective governments in the matter. Analogy, as I have already explained, points out the course to be pursued. It was a case for concurrent and mutual legislation—that of this Government being controlling and paramount—whenever it became necessary for Congress to interpose at all.

And this has been the course adopted. It became necessary for Congress to interpose; and this was done by an act which laid down a plan and rule—made a general regulation—in regard to the mode in which elections for representatives should be held. A very proper occasion was seized for making this new regulation, the commencement of a new Decade of years in the Congressional history of the country, under a new census, and a new apportionment of representatives. And Congress has begun this new Decade under this new regulation and mode of electing representatives. Twenty-two States (twenty-three now that Georgia has legislated on the subject) have the necessary supplemental regulations. And the laws of these States, with the law of Congress, form together the body of legal regulation for the election of representatives contemplated and required by the Constitution; and under this body of laws this House of Representatives is now constituted.

But four States have elected by general ticket, though expressly prohibited from doing so by the law of Congress. These States, and their *quasi* representatives, (with two exceptions,) and their political friends on this floor, attempt to justify that act of daring nullification performed in the States, and they claim that this act shall be confirmed by a still more formal and more daring act of nullification on the part of this House. Let us consider then, for a moment, on what shallow pretence it is that this House now purposes to go to the length of nullifying the law of Congress.

There is no question as to the right of Congress to interpose with its legislation in this case; the only question made is as to the *mode* in which it has chosen to interpose. It has adopted the mode of establishing a general regulation, leaving the States to supply all particulars and details, if they have not done so already.

It is admitted, in the report of the Committee on Elections, that Com-

gress may, at any time, make *all* the regulations required or contemplated by the Constitution, leaving nothing for the State legislatures to do on the subject. It is admitted, also, that Congress may make *complete* regulations in regard to any one branch of the subject, as in regard to "the times," or "the places," or "the manner," leaving the State legislatures to act independently on such branch or branches of the subject as Congress should leave untouched, according to what the report calls their "imperative duty." So far the admissions of the report go; but here it stops short, and denies that Congress can make any *general regulation* in regard to any one branch of the subject, leaving the State legislatures to supply the necessary particulars as to *that branch*. And now for the reason, (for so fanciful and puerile a theory as this must have some show of reason offered to sustain it,) and the only reason, offered by the Committee, why Congress cannot interpose its legislation by making a general regulation on any one branch of the subject—the reason is this (I quote from the report:) "*It is entirely nugatory and inoperative without the aid of State legislation.*" It is added, by way of consequence, that, if it have any operation on the States, it is coercive like a command, and, as the States are not bound to obey, the act is unconstitutional and void.

It must be confessed that this is very strange reasoning; one hardly knows what to make of it, or how to treat it. It is clear that it is meant for reasoning—for reasoning on a point of constitutional law—and, as it is found in the report of a committee of this House, I suppose it must be treated gravely.

We say that here is a case for mutual legislation. It is so in the nature of the case, and by analogies and examples in operation and force from the first days of the republic. Congress is to do its part—as much or as little as it will—leaving the States to bring in their contribution and aid by all needful supplementary legislation. The answer which we have from the oracles of modern political wisdom is, that all legislation by Congress is utterly void which requires the aid of State legislation to make it operative or effective. In other words, there can be no such thing as mutual legislation between Congress and the State legislatures on any single independent point or topic whatever. Well, this argument—if argument it may be called—has the merit of boldness at least, considering how much legislation of this sort now exists, and how much more might exist, under various provisions of the Constitution. But it is not argument; it is mere naked assertion, without any thing in fact or in nature, under the light of heaven, to stand upon. What appears to be a reason is only an averment, and an averment over again, in substance, of the same proposition which it is adduced to sustain. The *proposition* is, (I speak of the substance of the thing,) that Congressional legislation, on any independent point or matter, cannot constitutionally be aided or helped out by State legislation to make it operative; the *reason* is, that it is inoperative without the aid of State legislation, which it cannot constitutionally have.

But the author of the report finds a case—and he might have found a great many—in which concurrent and mutual legislation cannot be resorted to, where the whole legislation on the whole subject, and every part of it, must be supplied by Congress. He refers to the power over

bankruptcies in the Constitution. But the power over bankruptcies existed in the States originally. It was a subject of municipal regulation—as much so as contracts or promissory notes. And their jurisdiction was not taken away by the adoption of the Constitution. It remained in full force, and was only to be taken away by the actual exercise of the power on the part of the national legislature, and then only to the extent to which the power should be exercised and continued by Congress.

The State laws on this subject operate, of course, only on the people of the States respectively, the laws of each on the people of each, as the subjects of one, and only one, local and independent government. When Congress legislates on the subject the case is changed. Then the people of all the States are regarded as one people—the subjects of one common government—and as if there was no such thing as a separation of the people into distinct communities or States. The laws on the subject are required by the Constitution to be uniform—not merely that they shall operate in a uniform way on the people of the several States, but that the laws themselves shall be uniform, operating as if there were no States, no confederacy, no union, but one people, forming one municipality, and governed by one law. And hence it is that there can be no joint legislation by Congress and the States for one and the same class of cases in bankruptcy.

When Congress takes cognizance of cases in bankruptcy, it must do so, regarding the persons on whom its laws operate solely as citizens of the United States, and wholly independent of the fact that the people are grouped in distinct municipal communities—*its laws must be uniform*. And this is not, therefore, a case in which it can borrow the aid of State legislation to supply the details of the system. All the laws must be uniform—every particular provision, as well as every general regulation—and must operate upon all. And, as one State cannot legislate for another, or for the people of another, the whole legislation must necessarily be supplied by Congress.

And this is the case, and the only case worth a moment's notice, on which the author of the report relies to show that there can be no such thing, in *any* case, as joint and mutual legislation by Congress and the States. He might as well have adduced the war power in the Constitution, or the commercial power, or any similar power belonging exclusively to this government as a national Government, to show the same thing, and they would have shown it just as conclusively.

But the question returns: Why may not Congress in this case—in regard to elections of Representatives from the several States—interpose in the way of a general regulation, touching the mode of holding the elections, and leave the States to follow and fill up the plan? The answer offered is: Because this way of legislating *does* require the aid of State legislation; and because it requires the aid of State legislation to make the system complete, it is inoperative, and therefore void. Congress has not the constitutional power to make such a law. Let us see now where this sort of reasoning will land us.

In the first place, it is admitted that if Congress had, at the time of passing the Election law, supplied the necessary particular provisions, it would not then have been unconstitutional or void; nor would it be,

if this present, or any future Congress, should supply these provisions; nor if the States, respectively, shall supply these provisions—for it is admitted that the States may voluntarily, or as an act of grace, legislate on the subject, though they cannot be commanded or required to do so. It is now actually in force in twenty-two States, insomuch, that whether their legislation preceded or has followed that of Congress, and whether voluntary or by reluctant compliance, the system is established and in operation, and none of these States which now elect by districts could re-establish or return to the General Ticket system so long as this Election law of Congress stands. All that is contended for is merely this: that the States which have not supplied the necessary provisions to give the law effect in those States, need not do it, and it is therefore void as to them. And what is the consequence of all this? Why, first: That this law is absolutely void to-day for want of the necessary constitutional authority in Congress when it was passed, which yet may be made perfectly constitutional and valid to-morrow, or next year, by further legislation, either by Congress or the States, which shall have no other object or operation but to make this very law—that is, a void and unconstitutional law—operative and effective! And next: That this same law, which is general in its scope and design, is unconstitutional and void in some States, while it is perfectly constitutional and valid in other States! It is actually the law of the land in New York and twenty-one other States, from which there can be no escape but by its repeal, while it is no law at all in New Hampshire and three other States!

And, again: It is admitted that Congress may fix the times, *or* the places, *or* the manner of holding elections, and that the States would be bound by an “imperative duty” to supply the regulations for such branch or branches of the subject as Congress should leave untouched. But it is perfectly manifest that in many cases such a law of Congress would be “inoperative without the aid of State legislation”—which is the very objection, and the only objection, urged against the present law.

Thus: Suppose a uniform day of holding elections for Representatives had been fixed by the first Congress, before Rhode Island came into the Union, and of course before she had any laws whatever on the subject of the election. In that State the law would have been inoperative without the aid of State legislation. No election for Representatives could have been held in that State, without State legislation fixing and regulating the places and the manner. Such a law would have been good and valid in all the other States—does the author of this Report mean to say it would have been void in Rhode Island? If such a law were now to be passed, it would be a good law in all the States now in the Union, but in regard to any new State hereafter admitted, it would be nugatory without the aid of the legislation of such new State—would it be void in the new State? So, too, if Congress should fix a uniform day for the elections, and that day should happen to be the first of March, Pennsylvania could not proceed to the election without the aid of State legislation. Her elections are conducted under inspectors elected by the people, and I understand they are now elected, by law, somewhere about the middle of March. But this law of Congress would be valid enough in other States--would it be void in Penn-

sylvania? Examples of this sort might be multiplied, but it is useless.

The truth is, that the notion which pervades the report of the committee, and which has been so much dwelt upon in the whole debate—that any general regulation in regard to the election of representatives is unconstitutional and void, unless the people can proceed to an election under it without the aid of additional legislation, is merely absurd; it has not one inch of ground to stand on. The single example found in the law concerning the time of choosing the electors of President, and which has stood on record for more than half a century, ought to have been enough to shame such a doctrine into silence. Congress fixed a period within which the choice should be made. No election could take place in any State without the aid of its own legislation, fixing the day; and nobody has yet been found to suggest that that law wanted constitutional soundness and validity.

In all these cases where a body of law touching any subject may consist, under our admirable system, of concurrent and mutual State and National legislation, the usual and the only fit and proper mode is for Congress to prescribe the general plan and regulations, and for the States to supply the particular provisions. It is a point of supreme excellence in our system that this course can be adopted. It is for the mutual advantage of all parties concerned. It renders our republican and representative system more practical and more perfect than it could otherwise be. It popularizes legislation in these cases beyond what would be possible without it.

And, in the case before us, Mr. Madison laid down this very rule as the proper one to be observed. Speaking in the Convention of Virginia, which adopted and ratified the Constitution, of the intention of those who framed and adopted the clause relating to the times, places, and manner of holding elections for representatives, and of the proper distribution of legislation in the case between the State legislatures and Congress, he said: "It was thought that the particular regulations should be submitted to the former, (the State legislatures,) and the general regulations to the latter," (to Congress.) This is the golden rule which has been followed in this case. Congress has performed its part. It is left to the State legislatures to supply the particular regulations, because this can be done more appropriately and more satisfactorily to the people by them. It is, besides, their business, and the business of their people. The people of the several States have a right to be represented on this floor, by elections conducted according to the mode prescribed by Congress, and not otherwise. And they have a right to all the legislation necessary and proper to enable them to make such elections. It is the "imperative duty" of their own State legislatures to supply this legislation, and it is their own fault if they allow themselves to be cheated out of their right for want of it.

I do not think the history of Governments could show a more inexcusable and wanton resistance to law than is here exhibited. The law is in every respect reasonable in itself, and is justified by abundant precedent. Congress could not have undertaken to cut up the States into election districts without incurring odium, if not resistance. State rights were carefully considered and respected, both in the system and in the mode of establishing it. The system itself brings the represen-

tatives nigher the people than any other mode could do it; and the formation of the districts is left to themselves and their own neighbors and friends representing them in their local legislatures. In the name of our common country, in the name of God, what do the people of these recusant States want? And what do the members of this House want, who sustain this shameful proceeding? Here is the so-called Democratic party, as represented in this House, breaking out in open hostility and resistance to a law which is more entirely democratic in all its features and concomitants than any law which Congress has passed for years and years together—a law which has been acquiesced in, and has met the sanction, now, of all but three States in the Union, prescribing a system which is the choice of more than eight-tenths of the people of the United States. It is difficult to account for such infatuation and folly. And the dominant party in this House, too, which might have spared, without weakening it, twice the number of members which a rigid adherence to the law of Congress would have cut off, consents to lend itself to this proceeding, urged by no necessity, impelled by no just motive, that I can learn from any public avowal, and justified by no reason or apology which does not vanish and melt away before the first steady gaze of sense and reason. The party feels power, and must employ it; I know of no other explanation of its course and conduct.

*Al. S. Johnson*

And in this proceeding it would seem as if every thing that is majestic in constitutional forms, as well as every thing that is sacred in law, order, and government, was to be profaned and trampled under foot. It begins with a gross act of practical nullification in several States. A law of Congress is openly set at defiance on the private and irresponsible opinion of individuals, or of a party, that the law is unconstitutional; and elections to Congress take place in violation and repudiation of the law. This House then takes up the proceeding. To give itself jurisdiction of the question, it sets itself above Congress, and claims the right to pronounce sentence of judicial condemnation on its acts. From a ministerial agent, appointed by the Constitution to give a law of Congress effect, it erects itself into a high Judiciary, and sits in solemn judgment over the law and the legislative power which enacted it. It is now about to pronounce its decree. It is about to do that which the Supreme Court of the United States, with its high and lofty attributes of personal and official character, pure, elevated, and independent, has never yet done—pronounce a law of Congress unconstitutional and void! And all for what? Why, for nothing—“for Hecuba.” Power—Power! The party feels power, and must use it. It cannot employ it to build up; it will employ it to pull down. It is the blind giant embracing the pillars of the Constitution, and, as his last act, bowing with all his might to bury himself, and all about him in one common ruin. Nullification here puts on a new phase. Once it was grave, solemn, sincere, earnest—acting from deep though mistaken convictions. Here it is flippant, sportive, wanton, and cruel, complaining of no oppression and no injustice, having no injuries to redress, and proceeding to its work as if it were the agent of the furies, fated to accomplish a certain amount of mischief and destruction. But I take leave of the subject.